

RESEARCH ON THE NATURE OF THE RANSOM PAID TO SOMALI PIRATES AND ITS EFFECTS



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1. Introduction

1.1 The Topic

The purpose of this thesis is to research the nature of the ransom paid to Somali pirates and to examine the effects. Here ransom is the sum of money where in the same sea voyage when the ship, cargoes and the crew members are seized by pirates that the ship owner or the cargo owners would pay to the pirates in order to redeem the ship and cargoes and to release the crew members.

The attacks of Somali pirates have posed great threats towards the whole world as the sea route through Somali sea area is one of the most important marine transport routes for international trade. So far no effective solution could be found to solve this problem. When a ship is seized by Somali pirates, the ship owner would always choose to pay the ransom to redeem the ship and cargoes. Such loss of ransom is substantial and is detrimental to the operation of the ship owner's business. If the whole loss must be borne by the ship owners, then in the long term the marine transport industry would be negatively impacted. Hence it is wondered if such loss of ransom could be shared by other parties. If so, how and to whom can such contribution be claimed?

The issue of loss of ransom has been long recognized in law. Under Roman law, such ransom could be regarded as general average and should be shared by all beneficiaries. But with regard to the ransom paid to Somali pirates, it has some new features and the legal theory under Roman law may not be applicable directly. Under York-Antwerp Rules and the domestic maritime laws of most states, no clear answer concerning the nature of the ransom is given. Generally, there are two ways to observe such ransom: it could be regarded either as marine salvage or as general average. However, when the same ransom is claimed under different headings, different effects may be caused. Especially, there is a concern that whether insurers could step in and such loss of ransom would be ultimately borne by the relevant insurers. In actual practice, the claim under general average could bring more benefits to both the ship owner and the cargo owners. Therefore, most ship owners would choose to claim loss of ransom under general average.

The discussion and analysis of the nature of the ransom paid to Somali pirates would help us to strike a balance between parties to a marine transport contract. Only when the loss of ransom is fairly shared, can interests of all relevant parties be protected. In return, the marine transport industry would have substantial developments in the future.

1.2 The Outline of The Thesis

This thesis would examine the nature of the ransom paid to Somali pirates from different perspectives.

Chapter 2 provides an overview of the legal resources utilized in the thesis.

Chapter 3 outlines the current situations of attacks of Somali pirates and raises the issue of ransom.

Chapter 4 researches the nature of the ransom paid to pirates within the context of Roman law.

Chapter 5 discusses the new features of the ransom paid to Somali pirates.

Chapter 6 researches the nature of the ransom paid to Somali pirates from the view of marine salvage.

Chapter 7 researches the nature of the ransom paid to Somali pirates from the view of general average.

Chapter 8 examines the different effects of claiming the loss of ransom paid to Somali pirates under marine salvage and under general average.

Chapter 9 provides a summary of and concluding remarks with regard to issues presented in the thesis.

2. Legal Sources

2.1 Conventions and UN Documents

Conventions and UN Documents are used in this thesis. They provide internationally recognized definitions, standards and conditions of different legal concepts. The relevant articles/sections in Conventions and UN Documents are used as the starting points for discussions and analysis of the nature of the ransom paid to Somali pirates.

2.2 Domestic Legislations

Domestic legislations are used in this thesis. They are used to illustrate a State's specific legal solution for a particular legal issue concerning the ransom paid to pirates. Also, they are used to further develop the relevant theoretical points.

2.3 Case Law

Case law, i.e. court judgements, is used in this thesis. It is composed by cases from common law jurisdictions. It is used to illustrate common law jurisdiction's specific legal solution for a particular legal issue concerning the ransom paid to pirates. Also, it is used to further clarify or develop the relevant theoretical points.

2.4 Insurance Conditions

Insurance conditions are used in this thesis. They are used to illustrate how various marine risks could be covered by different insurance policies. With regard to the same loss of ransom, whether it would be covered by a specific insurance would depend on the scope of the insurance and how the loss is claimed.

2.5 Legal Literatures

Both English and Chinese legal literatures are utilized in order to examine the nature of the ransom paid to pirates. They provide alternative reliable resources of materials for analysis. They also provide authoritative definitions and standards of different legal concepts for discussions. They are especially important when researching the nature of ransom from the view of marine salvage and from the view of general average. In this regard, various opposing ideas are raised in different legal literature. Through analyzing the opposing ideas stated in different legal literature, we would acquire a better understanding of the nature of such ransom.

3. Current Situations Concerning Attacks of Somali Pirates

In recent years, news about Somali pirates has always caught the headlines and attracted great attention worldwide. Somali pirates frequently attack the ship sailing through the Somali sea water. They seized the ship and demand ransom from the ship owner. Such attacks mainly happen in the Gulf of Aden¹. The Gulf of Aden is named after the city of Aden in Yemen and is a sea area between Somalis and Yemen in the Indian Ocean. It connects the Indian Ocean and the Red Sea and thus is a bottleneck for ships sailing to Europe via the Suez Cannel. There are about 30,000 ships that would sail across the Somalia sea area every year, which account for about 14% of the world-wide marine cargo transport and about 30% of the world-wide oil transport². Hence the attacks of Somali pirates pose great threats to the international trade. Piracy has impeded the delivery of shipments and increased shipping expenses, costing an estimated £10 billion a year in international trade³.

With the ending of Cold War and the collapse of the Siad Barre regime in early 1990s, Somalia fell into a long-term anarchy. Different areas were controlled by different warlords and warlords fought with each other⁴. Owing to such long-term civil war, the whole society was disordered. Therefore, the local people had great hardship in making a living and being a pirate would be one of the few profitable professions for them. Over years, Somali pirates had developed into different crime groups which had clear division of work. Among them, some groups were mainly composed by professional guerrillas who all had military and sailing trainings.

Since 2008, the attacks of Somali pirates are more and more frequent. In 2008, there were 111 attacks which included 42 successful hijackings. The rate of attacks in January and February 2009 was about 10 times higher than during the same period in 2008 and 'there have been almost daily attacks in March'⁵.

In September of 2008, Somali pirates seized a Ukraine registered ship *Faina*. At that time, there were 33 T27 tankers and other weapons on the ship⁶. The pirates demanded a ransom of USD 30 million. After 4 months, agreement was reached and USD3.2 million in cash was airdropped and the ship was immediately released.

In September of 2008, the Saudi Arabia's super oil tank *Sirius Star* was seized. The pirates demanded a ransom of USD25 million. After 4 months, USD3 million in cash was airdropped⁷ and the ship was released.

¹ BBC (2008) <http://news.bbc.co.uk/2/hi/africa/7735507.stm>

² Tao Zhang (2011) p.56

³ Michael Nicholson (2011) <http://www.telegraph.co.uk/travel/travelnews/8298095/Spirit-of-Adventure-Behind-the-rise-of-the-Somali-pirates.html>

⁴ Wikipedia (2011) <http://en.wikipedia.org/wiki/Somalia>

⁵ Associated Press (2009) <http://www.foxnews.com/story/0,2933,510766,00.html>

⁶ Xan Rice (2008) <http://www.guardian.co.uk/world/2008/sep/27/3>

⁷ Xan Rice, Matthew Weaver (2008) <http://www.guardian.co.uk/world/2008/nov/20/piracy-somalia>

On 2 May 2009, Somali pirates captured the *MV Ariana* with its 24 Ukrainian crew. The ship was released on 10 December 2009 after a ransom of almost USD3million was paid⁸.

On 8 April 2009, four Somali pirates seized the *Maersk Alabama* 240 nautical miles southeast of the Somalia port city of Eyl. The ship was carrying 17,000 metric tons of cargo, of which 5,000 metric tons were relief supplies bound for Somalia, Uganda, and Kenya. Master Philips was held as hostage and the ship owner was blackmailed for USD2 million⁹.

Considering the seriousness of piracy in Somali sea area, international organizations, e.g. International Maritime Organization, have expressed concern and urged the international society to take actions to battle such great threats to the global marine industry¹⁰.

But among all the problems caused by attacks of Somali pirates, the issue of payment of ransom would be the most important one for parties to a marine transport contract. So far no effective solutions have been found to solve the problem of Somali pirates. When a ship is seized by Somali pirates, the pirates would contact the ship owner and demand a ransom. Normally the ship owner would pay the ransom in order to redeem the ship and cargoes and to release the crew members. Such ransom is always of a substantial amount and becomes a very heavy burden over the ship owner. If it is solely borne by the ship owner, possible the ship owner may not be able to operate its business in a normal way. On the other hand, upon payment of ransom the cargoes are free from the control of Somali pirates and thus cargo owners are enjoying real benefits from the payment of ransom by the ship owner. Hence the ship owner may wonder if he could claim contribution to such loss of ransom from other parties. If so, how and to whom can the ship owner claim such compensation? All these questions await answers from maritime lawyers.

⁸ BBC (2009) <http://news.bbc.co.uk/2/hi/europe/8406303.stm>

⁹ BBC (2009) <http://news.bbc.co.uk/2/hi/africa/7989474.stm>

¹⁰ International Maritime Organization (2011) <http://www.imo.org/mediacentre/secretarygeneral/speechesbythesecretarygeneral/pages/piracyactionplanlaunch.aspx>

4. The Nature of The Ransom Paid to Pirates: Roman Law

Piracy has been in existence in history for a long time. From ancient Greece to Roman Empire and then to modern times, the skeleton flags have always posed great threats towards the ships sailing on the sea.

Generally ancient pirates were targeting at seizing the ship and the cargoes. As to the crew members on the ship, the pirates would most likely to kill them or sell them as slaves. But it was also allowed for the family members to redeem the seized crew members, for example the Roman Emperor Caesar had paid such ransom after being seized by pirates¹¹.

The ship and cargoes seized by pirates would normally be shipped back to his country. They might be offered to the government in exchange for the support for the piracy. Otherwise, they might be sold at the market for gold or silver coins. Of course, the actual owner of the ship or cargoes could also redeem their properties in the market. It is clear that in ancient times, whether it is to redeem the hostage or to redeem the ship and cargoes, the party sending the 'invitation' would always be the victim. The payment of ransom would be voluntary by nature.

As early as Roman Empire, the action of voluntary payment of ransom to redeem ship and cargoes had been characterized as general average. General average was firstly mentioned in the *Digest of Justinian* by reference to ancient Greek legislation: '*The Rhodian law decrees that if in order to lighten a ship merchandise has been thrown overboard, that which has been given for all should be replaced by the contribution of all*'¹² Thus when the ship and cargoes are facing the same danger and a sacrifice was made to save all, then general average could be introduced and what was sacrificed should be compensated by all the parties who had been then brought to safety. This mechanism allocated the risks among all relevant parties in a fair and efficient way and protected the developments of marine transport.

In terms of ransom, then the *Digest of Justinian* states: '*If a ship has been ransomed from pirates, Servius, Ofilius, Labeo, all agree that there should be a contribution*'¹³ Therefore under Roman law, the payment of ransom for common interests should be treated as jettison which should be shared by all the beneficiaries. But if the payment of ransom is only for the interests of specific persons, it is regarded that: '*But what the robbers have taken away, he must lose whose property it was; nor shall there be a contribution for him who has ransomed goods of his own.*'¹⁴ Hence such loss was born by the specific persons themselves.

Moreover, the *Digest of Justinian* did not mention the issue of sharing ransom that was paid to release the crew. But it states that: '*as for slaves who perished in the sea,*

¹¹ Plutarch (2011) http://www.livius.org/caa-can/caesar/caesar_t01.htm

¹² J.H.S.Cooke, R.R.Cornah (2008) p.1

¹³ Ibid. p.704

¹⁴ Ibid. p.704

*no greater valuation is to be set on them than if they had died of disease on shipboard, or had thrown themselves into the sea.*¹⁵ Hence we may deduce that the ransom paid to release the crew would not be treated as general average.

Hence in order to establish general average under Roman law, it must be proved: 1) the ship and cargoes must be in the same urgent situation; 2) the sacrifice of property must be voluntary; and 3) other property must be genuinely preserved due to such sacrifice.

It further provides that: *'if, the goods being preserved, the ship suffers damage or loses any of her tackling, there shall be no contribution.'*¹⁶ Hence, general average only applies to loss suffered for the common interests of both the ship and cargoes.

Under the influence of Roman law, the statutes of medieval eastern Adriatic states provided that the loss caused by pirates' attack on ship or cargoes could be treated as general average. General average includes all the loss and expense caused by pirates' attacks¹⁷.

In summary, the ransom paid to pirates for the common interests of the ship and cargoes was identified as general average under Roman law, provided such loss was genuinely caused by such common interests.

¹⁵ Ibid. p.706

¹⁶ Ibid. p.703

¹⁷ N.Bogojevic-Gluscvic (2005) p.21

5. The New Features of The Ransom Paid to Somali Pirates

As discussed above, under Roman law the ransom paid to pirates for the common interests of the ship and cargoes could be identified as general average. Thus in modern times, can the same rule still be applied so that ransom paid to Somali pirates would also be regarded as general average?

Although by definition, the piracy happened during Roman times and those happened in Somali sea area are all piracies, yet in practice the latter has lots new features which make it apart from the former. Before starting the discussion, we shall firstly take a look at the general features of the piracy happened in Somali sea area and the ransom so paid.

Firstly, the ship and cargoes would not be taken for reselling and the crew members would be detained as hostage for the ransom. After seizure of the ship, Somali pirates would drive the ship to the port which is under their control. The ship and cargoes are kept in the port and the whole crew members would be held in the cabin or on the deck. The pirates would then directly blackmail the ship owner and allege they are only for the ransom and not for lives of the crew members. Normally Somali pirates would not take the cargoes, amend the ship or kill the crew members. The crew members together with the ship and the cargoes would be immediately released upon payment of the ransom.

Secondly, the payment of ransom is indivisible. It is a lump sum payment. The pirates would not differentiate the proportions of ransom for the ship, cargoes and the crew members. It is different from ancient piracy where ancient pirates would ask for ransoms from both the family of the crew members and the ship owner. Likewise, the ransom paid to Somali pirates is not only to redeem the ship but also to release the cargoes and the crew members.

Thirdly, the calculation of ransom is based on the value of the ship and cargoes. Although the crew members are held for the ransom, the amount of ransom does not depend on the number of the crew members held. The deciding factors are the values of the ship and cargoes (especially the value of the cargoes). For example, in the incident of *Sirius Star* as mentioned above, the ship owner was blackmailed for USD25 million. The major reason is that the relevant vessel is the second largest oil tank in the world with value of about USD150 million and the oil transported by the ship was valued at about USD100 million. In the incident of *Faina*, the ship owner was asked for USD30 million as ransom. It is because the vessel was specially designed as an arms transport ship and at the time of seizure it carried 33 Soviet T27 tanks and some other arms. Hence, the calculation of ransom mainly relates to the value of the ship and cargoes.

Fourthly, the final amount of the ransom is determined through negotiations. After seizure of the ship and cargoes, Somali pirates always demand a huge sum of ransom. In order to protect the interests of the ship and cargoes, the ship owner would always

negotiate with the pirates through a third party. The final amount of the ransom would finally be determined through such negotiation. Owing to the mobility of international trade and the features of international transport documents, the ship owner normally does not know the final receiver of the goods transported on his ship. Thus the negotiation would often be conducted between the ship owner and the pirates only without attendance of representatives of the cargo owners.

To sum up, Somali pirates would hold the crew members as hostage in order to demand the ransom. The ransom has characteristics of indivisibility. The amount of the ransom is not decided by the number of the crew members held but the value of the ship and cargoes. The ship owner would negotiate with the pirates before paying the ransom. After paying the ransom, the ship, cargoes and the crew members would always be released. All these new features differentiate Somali pirates from ancient pirates and they impose new difficulties as well.

6. The Nature of The Ransom Paid to Somali Pirates: Marine Salvage

Maritime law has long recognized the problem of ransom. It regards that the ransom is the loss which should be shared by all stakeholders of a certain voyage. The respective share of the loss is the result of a compromise among different parties. Identifying the nature of the ransom is the prerequisite of clarifying the rights and obligations of different parties.

The core concept of marine salvage is to provide 'sharing of loss' but not a 'paid service' in marine salvage. In general, the requisition of marine salvage reward must meet the following elements: 1) the salvaged target must be property at sea; 2) the salvaged target must face risk from the sea; 3) the salvor has no obligation to provide such salvage; and 4) the salvage must be successful or with effects¹⁸.

Section (a) of Article 1 of International Convention on Salvage 1989 provides that: '*salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.*'¹⁹ In terms of the ransom paid to the pirates, the properties salvaged by such payment include the ship, cargoes and the freight at risk. Firstly, they are in the Somali sea area and thus are regarded as property at sea. Secondly, they are seized by the pirates and are facing risk from the sea. At this time, the crew members could not avoid or divert such risk through their own actions and must rely on external powers for assistance. Such risk does not need to be immediate or imminent. Hence, although Somali pirates would not damage the ship and take all the cargo immediately after seizure, there are still real risks from the sea. From the moment the ship and cargoes are seized by the pirates, they are no longer under the control of the master or ship owner. Such loss of control and the consequent absence of care and management all are potential threats. As time goes on, such potential threat would develop into a real risk which is faced by both the ship and cargoes as a whole. Further, if the ransom is not paid then the ship and the cargoes would not be returned. Hence, even the ship and the cargoes would not be taken by pirates immediately, the threat of failure to return is also a real threat. Therefore, when the ship and cargoes are seized by the pirates, they are facing risk from the sea.

Hence the most important question now is whether the ship owner has any contractual, occupational or legal obligation to provide such salvage for the cargo owners. In Lloyd's CMI Draft International Convention on Salvage (Montreal 1981), Article 3.6 provides that: '*No payment is due under the provisions of this Convention unless the services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose.*'²⁰ If the ship owner has clear understanding of strong presence of pirates in Somali sea area but still decides to sail on such route, could the cargo owners claim that the ship owner has chosen a wrong

¹⁸ Maritime Law (1998) p.166

¹⁹ ICS art 1(a)

²⁰ Liangyi Yang (1999) p. 214

route and thus is in breach of his contractual obligation of choosing a safe route for the voyage²¹? In response, we must note that the risks come not from the route itself but the presence of pirates. Hence the route through Somali sea area itself is suitable. It is the customary route for marine transport and it is not foreseeable whether pirates would appear at a certain voyage. Moreover if the ship owner decides to use the route through Good Hope Cape, the great increase of time and expense would be out of the contemplation of both parties at the time of signing the contract. Such deviation may also amount to unreasonable deviation. Further, there is no positive obligation imposed on the ship owner to deploy on-board security personnel in order to enhance the security. Even so deployed, such on-board security personnel or the crew members shall not be armed²². Hence, the absence of additional guard on board is not the reason of seizure by Somali pirates and cargo owners shall not use such absence as an excuse to claim breach of contract on the shipping party. According to *Best Management Practices to Deter Piracy off the Coast of Somalia and in the Arabian Sea Area*²³, the only obligation that the shipping party has is to keep 'liaison with naval forces and to ensure that naval forces are aware of the sea passage that a ship is about to embark upon and how vulnerable that ship is to pirate attack.' Hence as long as the shipping party keeps liaison with naval forces during its passage in the Somali sea area, it fulfils all its obligations as required by general practices. At this time, using the route through Somali sea area could also discharge the ship owner of his duty under the marine transport contract. By using this route, he is not in breach of contractual obligation. Thus, there is no subsequent duty to provide salvage when the ship is seized by pirates.

As to the occupational obligation, it is very clear that the ship owner is not the employee of the cargo owner and there is no other employment relationship between the two parties. Hence there is no breach of occupational duty. For legal obligation borne by the ship owner, only two types of such obligation are provided by law, i.e. the rescue of human life and the mutual rescue after collision of ships. Obviously the payment of ransom by ship owner does not fall into either of these two categories and thus there is no breach of legal obligation.

To sum up, the seizure by pirates is not owing to any breach of obligation on the part of the ship owner. Thus the ship owner has no contractual, occupational or legal obligation to provide such salvage for the cargo owners.

Normally, upon the payment of the ransom by the ship owner, the ship and cargoes would be immediately released by the pirates. Thus the rescue is successful and consequently such useful result would give the ship owner a right to reward.

²¹ Shouzhi An (2010) p.54

²² UK P&I Club (2011) http://www.ukpandi.com/fileadmin/uploads/uk-pi/Latest_Publications/Circulars/Piracy%20FAQs.pdf

²³ Witherby Seamanship International Ltd, (2010) http://www.secure-marine.com/bmp3/bpm3_pdf.pdf

Another relevant issue in question is whether the rescuing party must be a third party other than the ship owner and the cargo owner²⁴? Generally, what law requires is an external power for rescue. Some scholars regard '*salvage is defined as a service which confers an advantage by saving or helping to save a recognized subject of salvage when in danger from which it cannot be extricated without aid, if and so far as the rendering of such service is voluntary in the sense of being attributable neither to a pre-existing obligation, nor solely for the interests of the salvor.*'²⁵ According to such definition, the rescuing party does not need to be a third party other than the ship owner and the cargo owner. Here the payment of ransom is to redeem both the ship and cargoes and thus it meets the requirement. As long as it is not solely for the interests of the salvor, i.e. only to redeem the ship, then the ransom could be claimed under marine salvage.

We must note that for the cargo owners, the payment of ransom by ship owner constitutes a marine salvage. But for the ship owner, it is only self-help. If for the ship owner, the payment of ransom is also marine salvage, then the ship owner would be both the creditor and the debtor in the same legal relationship. Thus the rights and obligations would be set off. Hence, the ship owner could not claim compensation for his share of ransom under marine salvage. Such uncompensated share of ransom would be loss for the ship owner. Thus the ship owner would avoid claiming loss of ransom under marine salvage. Therefore, claiming loss of ransom under marine salvage is more for academic discussions and is rarely applied in actual practice.

²⁴ Xinmu Wang (2011) http://wangmuxin.lcnlaw.com/Law_Note_Topic.htm?fn=20110930101657

²⁵ Maritime Law (1998) p.167

7. The Nature of The Ransom Paid to Somali Pirates: General Average

7.1 Preliminary Issues

Before considering whether the ransom paid to Somali pirates could be regarded as general average, some preliminary issues need to be addressed. It is argued that compare with ancient pirates, Somali pirates are more destructive and there is a chance that they would be identified as terrorists. If so, paying ransom to the pirates is actually funding the terrorists' activities and regarded illegal. Thus, could the ship owner still claim the ransom to be shared by all relevant parties²⁶? Even where pirates are not regarded as terrorists, paying ransom itself may be regarded as illegal. Hence, if it is illegal to pay the ransom, such ransom still could not be shared as well²⁷.

We now discuss these two questions separately. Firstly, could piracy acts conducted by Somali pirates be regarded as terrorism acts?

The Article 101 of *United Nations Convention on Law of the Sea* provides that:

*'Piracy consists of any of the following acts: a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private aircraft or ship, and directed: i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a private ship or aircraft; c) any act of inciting or of intentionally facilitating an act described in subparagraphs (a) or (b).'*²⁸

Clearly, within the context of international law, the establishment of piracy must meet the following elements: 1) Piracy is a crime conducted by crew or passengers of a private aircraft or ship for private ends; 2) Piracy happens on the high sea or a place outside jurisdiction of any State. The conduct of hijacking within a specific jurisdiction is not piracy under international law; and 3) Piracy is an illegal act of violence or detention no matter it is for obtaining advantages, or for pure revenge²⁹.

On the other hand, although no specific definition of terrorism is provided in international conventions, dictionaries, domestic terrorism-related legislation and description adopted in international meetings all have emphasized the feature of political purposes, i.e. terrorism acts are conducted for political purposes. For example, the United Nations General Assembly has repeatedly condemned terrorist acts by using the following description: *'Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular*

²⁶ Xinmu Wang (2011) http://wangmuxin.lcnlaw.com/Law_Note_Topic.htm?fn=20110930101657

²⁷ Ibid.

²⁸ UNCLS art.101

²⁹ Wenpei Li (2010) p.101

*persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them*³⁰. Some scholars believe that terrorism is a political concept. *‘It is a non-rational measure adopted in non-rational social conflicts, racial conflicts, religious conflicts or national conflicts to achieve specific political purpose*³¹. Cases in point are the 9.11 attack in U.S.A during 2001 and the terrorists’ attack of Mumbai, India in 2008. Therefore, terrorism acts are always taken in order to achieve certain political purposes.

As discussed above, Somali pirates are for ransom only; they even would not take the ship and cargoes or kill the crew members as long as the ransom would be paid. Hence the piracy conducted by Somali pirates is driven by economic purposes rather than political purposes. It is highly dubious whether Somali pirates could be regarded as terrorists. Thus there are fundamental difference between Somali pirates and terrorists. Further, there is not any concrete evidence proving that piracy in Somali sea water has connections to the existing terrorism organizations. Hence paying the ransom to Somali pirates should not be regarded as funding terrorists’ activities.

Thus, now we come to the second question: should the payment of ransom to Somali pirates be regarded as illegal? Thomas on the *Modern Law of Marine Insurance* states that:

*‘As a matter of general principle, the assured’s obligation to take reasonable measures to avert or minimize loss will not extend to having to take measures which are either illegal or contrary to public policy according to the proper law of the contract or the lex fori. Consequently, he will not be able to recover in respect of such measures if he does take them. If the measures taken by the assured are not illegal or contrary to public policy on these principles but the acts of those with whom the assured is dealing with are so tainted, it is a question of fact whether the measures he takes are reasonable so as to entitled him to indemnification.*³²

For example, in UK, *Havelock v. Rookwood*³³ regarded the ransom paid to the pirates is illegal as it would connive the pirates for more piracy attacks. But with the abolishment of *Ransom Act 1782*, the payment of ransom would no longer be regarded as illegal. As long as the ransom is not paid to terrorism organization or relating to any political purposes, then the payment is legal.

Another example is the case of *Sirius Star* as mentioned above. Although Saudi Arabia government refused to conduct negotiations with Somali pirates over seizure of *Sirius Star* but the government expressed that the ship owner himself had other options. It means that although the government would not pay the ransom, the government would not forbid the ship owner to pay the ransom by the ship owner

³⁰ UN (1994) <http://www.un.org/documents/ga/res/49/a49r060.htm>

³¹ Hongjie Tian (2003) p.31

³² J.H.S.Cooke, R.R.Cornah (2008) p.112

³³ *Havelock v. Rookwood* (1799) 8 Dun & E 268

himself. Hence, we should differentiate the illegality of the pirate's seizure and the legality of ship owner's payment of ransom.

Pirates adopt violent measures to seize the ships, cargoes and hold crew as hostage in order to obtain ransom. Such conduct infringes the property rights of by the ship owner and the cargo owners as well as the physical freedom of the crew. It causes great loss to the international trade and marine transport industry. Thus it poses great harm towards to whole world and should be punished under law. From the definition of piracy mentioned above, we may discern that legal punishments aim to punish the violent seizure by the pirates but not to punish the payment of ransom by the ship owner. From the point of criminal law, criminal sanctions are designed to punish the behaviour that poses serious harm towards the interests of others. Its purpose is to prevent the crime. We should punish the illegal action which infringes other's legal interests but not to punish the action adopted to protect one's legal interests. The payment of ransom intends to redeem the ship and cargoes and to rescue the detained crew members. It is not to expand the loss but to limit the loss. Thus the conduct itself poses no threats towards the whole society. Owing to the the limitations of state power, when a ship is seized by pirates it would be very hard for the government to take actions and successfully rescue the ship and the crew members. The payment of ransom is therefore a solution that would be adopted when the state power could not effectively solve the problem. In fact, it is always regarded as the only plausible solution in a lot of cases. It has high efficiency and may prevent a lose-lose outcome between the ship owner and the pirates. Also, there is no evidence showing that the non-payment of ransom could effectively discourage the pirates from conducting more piracy in the future. By nature, the payment of ransom is a self-help conduct. Thus the legality of such payment should not be challenged.

7.2 The Ransom Under General Average

Although under Roman law the ransom paid to the pirates was regarded as general average, in modern times the nature of such ransom is more complex than that under Roman law.

In some countries, such ransom is clearly identified as general average in legislation. A case in point is German Commercial Code. Art. 706 of *German Commercial Code* stipulates that:

'Instances of general average

General average occurs in particular in the under mentioned cases, provided that at the same time the requirements of sections 700, 702 and 703 are also present, to such extent as the following provisions do not provide otherwise...6. When in a case of arrest of the ship by enemies or pirates, ship and cargo are ransomed. Whatever is

*paid as ransom forms part of general average together with the expenses incurred by maintenance and the ransom of hostage.*³⁴

Thus under German law, when there is a loss of ransom, it would automatically be regarded and dealt with as general average. This is in line with the legal theory under Roman law.

In common law world, the ransom paid to pirates has also been gradually recognized as general average through different cases. For example, in English case *Hick v .Palington*³⁵, it is regarded that cargo given to pirates by way of ransom was a sacrifice that was a subject for general average contribution.

In *Barnard v.Adams*³⁶, an US case where there was an imminent peril of being driven on a rocky and dangerous part of the coast, when the vessel would have been inevitably wrecked, with loss of ship, cargo, and crew. This immediate peril was avoided by voluntarily stranding the vessel on a less rocky and dangerous part of the coast, whereby the cargo and crew were saved uninjured. In this case, it was held that *'the ransom from pirates is to be contributed for; the loss is inevitable, and indeed actual.'* Thus the ransom paid to pirates is regarded as part of general average and shall be shared by all relevant beneficiaries.

Similar reasoning was shown in *Peters v. The Warren Insurance Company*³⁷. This was a US case on a policy of insurance dated the 1st of April 1836 where the defendants insured the plaintiffs' eight thousand dollars on the ship Paragon for one year from 15th March 1836 at a premium of five per cent. The declaration alleged a loss by collision with another vessel, without any fault of the master or the crew members of the Paragon and insisted on a general average and contribution. It was held in this case that:

'The case of a ransom after capture stands upon similar grounds. The ransom is, in a strict metaphysical sense, no natural consequence of the capture. It may be agreed upon long afterwards: and if we were to look to the immediate cause, it might be said that the voluntary act of the party in the payment was the cause of the loss. But the law treats it as far otherwise; and deems the ransom a necessary means of deliverance from a peril insured against, and acting directly upon the property. The expenses consequent upon a capture, where restitution is decreed by a Court of Admiralty upon the payment of all the costs and expenses of the captors, fall under a similar consideration. In such cases, the decree of the Court allowing the costs and expenses may be truly said to be the immediate cause of the loss; but Courts of justice treat it also as the natural consequence of the capture.'

³⁴ S.L. Goren (1998) pp.277-279

³⁵ Hicks v Palington (1590) Moore's (Q.B.) R297

³⁶ Barnard v Adams 13 L.Ed.417

³⁷ Peters v The Warren Insurance Company 10 L.Ed. 371

Clearly, here the ransom is regarded as a necessary means to avoid a peril insured against. It is a natural consequence of the seizure by the pirates and thus the ransom is subject to general average.

But under the York-Antwerp Rules ('YAR'), being the first and the most influential codification of rules relating to general average, and under the maritime laws of most countries, it is not clear whether the ransom paid to Somali pirates could all be treated as general average. The definition of general average is provided in rule A of the YAR. It provides that:

*'there is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure. General average sacrifices and expenditures shall be borne by the different contributing interests on the basis hereinafter provided.'*³⁸

Therefore, in order to establish general average, the following elements must be satisfied: 1) there must be a common maritime adventure; 2) there must be a peril threatening the common safety of the ship and cargoes; 3) the sacrifice or expenditure must be intentional; 4) the sacrifice or expenditure must be extraordinary; and 5) the sacrifice or expenditure must be reasonable.³⁹

7.2.1 A Peril Threatening Common Safety of The Ship and Cargoes

General average requires that such peril must be real and should not be just a subjective speculation even such belief is reasonable and bona fide. In *Joseph Watson & Son Ltd. v. Firemen's Fund Insurance Co. of San Francisco*⁴⁰, the master saw smoke from the hold and mistakenly assumed that there was a fire in the hold. By relying on such assumption, he directed high-pressure steam into the hold in order to extinguish the fire and damaged the cargoes. But later it was found that no fire was present. Rowlatt J held that the damage to cargoes could not be claimed general average. There was no actual fire in the hold and thus there was no real peril. Thus the test is objective: it is not whether in the master's belief there was a fire but whether there was an actual fire.

Further, there must be a threat to the physical integrity of the properties involved and mere risk of loss of economic value or commercial utility is insufficient. Generally, Somali pirate ships would not damage the ship and take cargoes. Thus it is argued that the pirates pose no real risk of damage to the ship and cargoes. If so, could we still say there is still a peril threatening the common safety of ship and cargoes?⁴¹ In reply, two contrary arguments could be raised. Firstly, the threat to the physical integrity of the property only needs to be real. It does not need to be an immediate or imminent threat.

³⁸ YAR 2004 art.22

³⁹ Maritime Law (1998) p.191

⁴⁰ *Joseph Watson & Son Ltd. v. Firemen's Fund Insurance Co. of San Francisco* (1922) 2 K.B. 355

⁴¹ Xinmu Wang (2011) http://wangmuxin.lcnlaw.com/Law_Note_Topic.htm?fn=20110930101657

Somali pirates would not immediately damage the ship and take cargoes, but it does not mean the pirates would never do so. Compared with piracies happened elsewhere, we could only say the seizure by Somali pirates would expose all the properties to a relatively low risk of damage. But it does not mean there is no real risk of damage. If the ransom is not paid by the ship owner within a reasonable time, then it is highly possible that the ship and cargoes would be taken by the pirate and would not be returned. At this time, the physical integrity of the properties is destroyed. Hence there is always a real threat to the properties, i.e. the threat of not returning the ship and cargoes, after seizure by Somali pirates, although such threat is not immediate or imminent. Secondly, the threat to the physical integrity of the properties does not necessarily come from the direct act of pirates. Seizure means that the ship owner has lost his control over the ship and cargoes. Since the crew members are detained by the pirates, there would be absence of care and management which would invariably pose a potential risk. As time goes on, the properties would be in a state of long-term non-attendance and therefore the potential risk would develop into a real threat to both the ship and cargoes. Such threat does not come from the direct act of pirates but the inability of the crew members. Likewise, it is also not a subjective speculation. Considering these two arguments, although Somali pirate would not interfere with the properties immediately, we cannot deny that there is a real threat posed to the ship and cargoes.

In addition, general average requires that there must be a danger threatening the common safety of the ship and cargoes. When the ship is seized by the Somali pirates, the ship and cargoes are all in the control of the pirates. If the ship could not get rid of pirates' control, the cargoes would then suffer loss. Hence, the safety of ship and that of cargoes are both threatened by the peril.

7.2.2 The Ransom Paid For Common Interests of Both The Ship and Cargoes

It is a distinguishing feature of general average that there should be a common adventure with at least two interests actually exposed to the danger of damage. The presence of a single interest should in principle give rise to only to a particular average loss or a particular charge. Somali pirates hold the crew members as hostage to demand the ransom from the ship owner. But for the ship owner, the payment of ransom is not only to protect the safety of the crew members but also to protect the common interests of both the ship and the cargoes. Since the calculation of the ransom is based on the value of the ship and cargoes, it denotes that the real consideration for the sum of ransom is the common interest of both the ship and the cargoes.

A relevant issue here is whether the sum contained in the ransom for release the crew members should be deducted when calculating the general average. Some argue that

such sum should be borne by the P&I club and shall not be ultimately paid by the insurers of the ship and cargoes⁴².

But in practice, the problem is that the ransom is a total amount and it is hard to ascertain which part is used to redeem the ship and cargoes and which part is used to release of the crew members. In such situation, it is hard to deduct the amount to release of the crew members from the total amount of general average. Meanwhile, the calculation of ransom is based on the value of the ship and cargoes. Although the crew members are held for the ransom, the amount of ransom does not depend on the number crew members held. Thus possible we may presume that the ransom is totally paid to redeem the ship and cargoes and release of the crew members is a side outcome of the redemption, unless and until clear contrary evidence may be introduced. Further, in marine salvage, the salvor has no rights to claim award for salvage of lives of people because saving people is regarded as the basic obligation of all salvors under international law. Hence, the same obligation shall also be applied to general average as well. In terms of saving of lives, if we adopt one standard when the saving is conducted under marine salvage and another standard when the saving is conducted under general average, then there would be conflicting outcomes. It is unreasonable and unfair to do so. As long as a ship is facing risks from the sea, the same standard shall be applied to saving of lives. Lastly, if we regard the whole ransom to be used to redeem the ship and cargoes then the calculation of general average would be largely simplified and all potential disputes would be kept to the minimum. Thus in the case *Royal Boskalis Westminster NV v Mountain*⁴³, it was held that if a paid ransom facilitated the redemption of the ship and cargoes and the release of the crew members but the ransom itself was not clearly identified for release of the crew members, then the court would not apportion part of the ransom as saving of lives and should regard the whole ransom as payment for redemption of the ship and cargoes. Thus although the payment of ransom has facilitating the release of the crew members, this part should not be deducted for calculation of general average.

7.2.3. The Payment of The Ransom Is Intentional

A general average must be intentional, i.e. it must be made with the sole object of preserving from peril the interests involved. Also, it must be a result of the master's free choice, i.e. he must not be acting under superior order. Master must be able to make up his own mind as to what he is to do in order to advantage the common adventure⁴⁴.

Normally, general average measures should be ordered by the master. But as to the ransom paid to Somali pirate, it is paid by the ship owner rather than the master. Hence is the subject of ordering general average measures limited only to the master? Or can the ship owner also have the rights to order general average measures? It is

⁴² Xinmu Wang (2011) http://wangmuxin.lcnlaw.com/Law_Note_Topic.htm?fn=20110930101657

⁴³ *Royal Boskalis Westminster N.V. v Mountain* (1999) QB 674

⁴⁴ *Athel Line Ltd. V Liverpool & London War Risks Assn Ltd.* (1994) KB 87

regarded that when a decision for general average is made, the rights of making such decision may not necessarily be limited only to the master. In fact, such rights could be enjoyed by other persons as well, for example the ship owner. Ship owner is the employer of the master and has rights to give instructions to the master. He entrusts all his power to the master, including the power of declaring a general average, for the daily operations of the ship. Where the situation requires general average to be called in but the master is unable to exercise his rights, the ship owner is thus entitled to exercise his discretion, which he has entrusted to the Master, himself. Such rights could also be exercised by third parties who are servants or agents of the ship owner.

During the Stockholm Conference in 1924 an amendment was intended to be made in order to add the words 'by the Master or his representative' after the word 'incurred', but later such amendment was withdrawn⁴⁵. Such amendment, if successful, would introduce further qualification to the terms in rule A of YAR. Thus we could assume that the intention of the Stockholm Conference was not to introduce such a qualification. Hence, if a general average was not specifically ordered by the master a claim to allowance in general average would always not be forbidden. Further there is no requirement that a consultation process must be done between the master and the ship owner before making the sacrifice. Hence, as long as the act meets the elements of general average, the fact that the master was absent at the moment of the marine incident should not be the grounds on which the compensation in general average shall be denied. In fact, during the period when the ship is seized by Somali pirates, the master would be detained and thus could not exercise his discretion to declare a general average. At this moment, the ship owner is entitled to step in and exercise the rights which he has entrusted to master.

General average requires the measures taken must be intentional. As to the meaning of 'intentional', some scholars argue it means that the shipping party clearly understand that the measures taken would lead to certain results. But in order to avoid the common peril faced by the ship and cargoes, he has to take such measures⁴⁶. Some scholars believe that 'intentional' means a voluntary active action leading to certain outcome. Voluntary action is an indispensable element⁴⁷. Voluntary means the adoption of general average measures must be based on the will of the person taking the actions. If the measures are taken owing to the external forcing factors, the measures cannot be included in the general average. With regard to the ransom paid to Somali pirates, it is argued that the payment of ransom is due to the threat from the pirates and thus the ship owner is compelled to do so. Hence, the loss of ransom is not included in the general average. Therefore the key question is whether 'voluntary action' is an indispensable element of the general average? In fact, not all general average has such 'voluntary' nature. For example, general average could include the order from the port authority. Such order is not the voluntary action taken by the

⁴⁵ J.H.S.Cooke, R.R.Cornah (2008) p.86

⁴⁶ Yuzhuo Si (2003) p.284

⁴⁷ Xianmin Chen (2006) p.285

master and the master could only follow the order without any objections. Hence, the requirement of 'intentional' only requires the shipping party to understand that such measures may cause loss extra to the ordinary operation costs. But due to the common interests of the ship and cargoes, the shipping party has to take such measure. It might be argued that common law regards 'voluntary sacrifice' as an element of general average. In *Barnard v. Adams*⁴⁸, the judge regarded that general average is the intentional sacrifice of partial properties in order to rescue other properties and the crew in the common adventure. As long as the properties sacrificed could rescue other properties, it is enough. Therefore, the requirement of 'voluntary sacrifice' in common law only requires the shipping party to understand that the measures are for the common interests of both the ship and cargoes. It could be a measure that is compelled to be taken. Hence the meaning of such 'voluntary sacrifice' is actually in line with the first opinion mentioned above. In terms of the ransom paid to Somali pirate, the payment is a measure taken for the common interests and the loss of ransom is outside the loss of ordinary operation loss. Hence, the payment of ransom is intentional.

7.2.4 The Payment of The Ransom Is Reasonable

General average requires the measures taken by the shipping party must be reasonable. A general average contribution cannot be recovered for an act which was unreasonably done.

Such requirement of 'reasonable' has two meanings: 1) the decision to conduct the act of general average itself is reasonable; 2) The measures taken to conduct the act of general average is reasonable. As to the first question, the legality of ransom payment to Somali pirates has been discussed above. So far even foreign naval forces have been present in Somali sea area, such presence still could not fully solve the problem. Therefore paying the ransom is still regarded as the most practical solution for piracy. As long as the state power could not solve the pirate problems, the payment of ransom by ship owners is a manner of self-rescue and is always reasonable.

As to the second question, general average measures shall not exceed the actual needs. The danger necessitating a general average act will not excuse conduct not required for purpose of general average. The shipping party should preserve the common interests at the expense of the minimal sacrifice. There is no absolute standard to evaluate whether certain measures are reasonable. The criterion of reasonableness is decided according to what the master deems judicious with reference to the state of things at the time the act is performed. Normally, factors like the external situation of the ship and cargoes, the plausibility of the measure and the objective effects of the measures would be taken into consideration.

It may be argued that the negotiation of final amount of ransom is conducted between the pirates and the ship owner. Thus cargo owners normally would not participate in

⁴⁸ *Barnard v Adams* 13 L.Ed.417

such negotiation. Hence even it is legal to pay the ransom, how can we determine whether the amount of ransom is reasonable⁴⁹? In fact, the reasonableness of the amount of ransom is a factual judgement which shall be decided by the court. The requirement of 'reasonable' requires the costs and the value of the ship and cargoes preserved should be reasonable. Therefore, the reasonable amount of the ransom should be judged by referring to the situations and the property value on the ship. As to the costs outside of this reasonable scope, it should not be shared by all relevant parties. But this does not impact the sharing of costs which fall within the reasonable scope. Normally, after negotiation the ship owner would bring down the amount of the ransom and it reduced the loss suffered by all the relevant parties. In fact, it is the common interests of both the ship owner and cargo owner to bring down the final amount of ransom. Also, the amount of ransom is much lower than that of the ship and cargoes. For example, in *Sirius Star*, the owner paid a ransom of USD3 million, which is much lower than the amount firstly demanded by the pirates. It is also much lower than the total value of the ship and the cargoes, which amounted to USD250 million. In *Faina*, the ransom paid by the ship owner is USD3.2 million. It is also much lower than the amount firstly demanded by the pirates. Hence the payment of ransom is a measure which shall bring greater security at the expense of smaller sacrifice.

7.2.5 The Payment of The Ransom is Extraordinary

General average requires that the sacrifice and expenditure incurred must be extraordinary. The extraordinary nature of general average requires that such loss must not be within the general duty on the ship. Hence it is important to determine whether the ship owner has any relevant duties when the ship and cargoes are seized. As a general rule, a person cannot claim a payment from another merely because the latter has derived a advantage from the actions of the former. In particular, under the marine transport contract, the ship owner is bound to do all that is requisite in the ordinary course of the voyage for the safe transport of the goods to their port of delivery. Even where a general average situation has arisen, such obligation would continue and thereby restricting the options available to the ship owner as to how to respond to the danger. 'Extraordinary' means that the sacrifice and expenditure must be incurred by the measures which are outside of the due obligation of the shipping party. It includes two meanings: 1) the sacrifice or expenditure is incurred outside of the ordinary operation of the ship; and 2) the sacrifice and expenditure is incurred outside of the due obligation⁵⁰.

When the ship is seized by Somali pirates, it is an incident outside of the ordinary operation of the ship. Hence, the payment of ransom is also the loss outside of the ordinary operation of the ship. Ship owner has full power to dispose of his own property and he has no absolute obligation to redeem the ship. By contrast, whether to

⁴⁹ Xinmu Wang (2011) http://wangmuxin.lcnlaw.com/Law_Note_Topic.htm?fn=20110930101657

⁵⁰ Maritime Law (1998) p.195

redeem the ship is a right of the ship owner. Hence, in terms of the redemption of the ship, the ship owner has no duty to do so. Further, in a lot of situations the ship owner is also the carrier or actual carrier. At this time, does the ship owner bear an obligation to redeem the seized cargoes? It is generally regarded that carrier has obligations to maintain seaworthiness of the ship, to maintain constant duty of care of cargo and not to conduct unreasonable deviation. In terms of maintaining seaworthiness, such obligation would normally be fulfilled as long as the ship is physically capable to transport the cargoes. As mentioned above, there is no positive obligation for the ship owner to deploy additional security personnel on board to enhance the security even the route through Somali sea area may expose the ship to high risks of piracy. In fact, passing the Somalia sea area is just following a customary voyage route. The only obligation for the shipping party is to keep liaison with naval forces during its passage of the Somali sea area. Hence, the cargo owners shall not use absence of additional security force as reasons to argue unseaworthiness. Therefore, whether there is any obligation to redeem the cargoes depends on whether such obligation falls within the duty of care of cargo.

Duty of care of cargo means the carrier shall properly and carefully load, move, stow, carriage, custody, care and discharge the cargo. Such duty starts from port of loading and ends at port of delivery. Duty of care of cargo is normally regarded as mandatory and the carrier could not be exempted from such duty. But when the ship is seized by pirates, there is no duty requiring the ship owner to pay ransom in order to guarantee the cargoes would arrive at the port of delivery on time. The very purpose of duty of care of cargo is not to warrant that the cargo would arrive at the port of delivery unconditionally. The purpose is to preserve the business value of the cargo to its maximum.

On the other hand, the mandatory nature of duty of care of cargo is relative. When the loss of control is not due to the fault of the carrier, the duty would be suspended. The duty of care of cargo is limited to duty duration and such duration requires the cargo to be under the carrier's control. If the carrier could not control the cargo, then the conduct of care of cargo could not be exercised over cargoes. For the duties which are impossible to be fulfilled, the law could not enforce so. After being seized, the ship owner loses the control over the cargo. When ship owner has no faults for such seizure, ship owner's duty would be suspended. Therefore, the duty of care of cargo does not require the cargo to be delivered at the final destination port unconditionally. The obligation of paying the ransom to redeem the ship and cargo is one outside of due obligation. Hence the requirement of 'extraordinary' would be fulfilled.

In summary, although the Somali pirates would only hold the crew members as hostage, it does not mean the ship and cargo would be out of danger. By contrast, since the crew members are detained and the ship owner has lost the control over the ship the cargo on the ship lacks the necessary care. Such lack of care poses threat to the physical integrity of properties. Also, if the ransom is not paid on time, then the ship and cargoes would not be redeemed, the cargo also could not be preserved. The

peril is thus real and common. Somali pirates demands ransom basing on the value of ship and cargoes. Since the ransom is indivisible, the ransom paid by the ship owner should be regarded as for the common interests of the ship and cargoes. Voluntary action is not the element of general average and the requirement of 'intentional' only requires the measures to be mandatory for the common interest of the ship and the cargo. With regard to the general situations, the payment of ransom to redeem the ship and the cargo is a reasonable measure. The reasonableness of the amount of the ransom is only a factual judgement. The cargo owners may raise questions of the reasonableness of the ransom. But such requisition would not obstruct the reasonable part of the ransom to be included in the general average. The duty of care of cargo does not require the shipping party to deliver the cargo at the destination port unconditionally. Further, the duration for the duty would be suspended when the ship is seized by pirates. Thus the ransom is a loss additional to the due obligation borne by the ship owner towards the cargoes and the sacrifice or expenditure would be extraordinary. It meets the special requirements of the general average. After paying the ransom to redeem the ship and cargo, such ransom should be shared by all the beneficiaries.

8. The Effects of Claiming The Loss of Ransom Paid to Somali Pirates Under Marine Salvage and Under General Average.

With regard to the discussions above, it is clear that the claim for payment of ransom to Somali pirates could be realized in two different ways: it could either be shared under general average otherwise it could be established under the requisition of marine salvage reward. When the ship and cargoes are facing common perils, if the measure taken by one party can preserve the properties of both parties, then the elements of marine salvage and general average are both met. But these two methods are mutually exclusive and the ship owner could only opt for one for claim. If the ransom is recognized as the marine salvage reward, then the same ransom could not be regarded as general average for sharing. As mentioned, the payment of ransom under marine salvage could only be established against the cargo owner and only the cargo owner could be requested to pay for the marine salvage. Thus, the ship owner must make his wise choice

8.1 The Effects of Claiming The Loss of Ransom Under Marine Salvage

Compared with general average, the advantage of claim under marine salvage is that the creditor could exercise maritime lien. In *Lyrma (No.2)*⁵¹, LJ Brandon states:

‘It has long been an established principle that a maritime lien on a ship for salvage has priority over all other liens which have attached before the salvage services were rendered. The basis for the principle is an equitable one, namely that the salvage services concerned have preserved the property to which the earlier liens have attached, and out of which alone, apart from personal remedies against the ship owners, the claims to which such liens relate can be satisfied... the principle has been established for so long that I do not consider that I should be justified in departing from it...’

But we should note that the maritime lien could only be established over the specific ship which is subject to maritime claims. Hence if the ship owner is the creditor, he could not exercise such maritime lien against the cargo owner as the lien is not fixed on cargoes. Thus with regard to the ransom paid by the ship owner, maritime lien could not be used by the ship owner as a weapon to secure the share of ransom owed by the cargo owner. What is even worse is that if the cargo owners, rather than the ship owner, who has paid for the ransom, then the cargo owner, as the salvor and creditor, can then exercise the maritime lien against the salvaged ship. The ship owner may have also made sacrifice for the common interests of the ship and cargoes. But he could not exercise maritime lien against the cargo owner and by contrast is under the threat of maritime lien from the cargo owner.

Claiming under marine salvage may pose other difficulties. In theory, the ransom paid to Somali pirates could be separated into two parts: the part paid for ship owner’s self-

⁵¹ *Lyrma (No.2)* (1978) 2 Lloyd’s Rep. 30

help and the part paid for marine salvage of cargoes. But in practice, it is very hard to do so. The pirates would not conduct separate negotiations with the ship owner and the cargo owners to fix different parts of the ransom. There is only one amount of ransom and that is for salvaging both the ship and cargoes. Hence it would be difficult to calculate the part paid for marine salvage of cargoes. Further, when facing the attacks from Somali pirates, the ship owner and the cargo owners are both victims. If one claims marine salvage reward against another, then the other party shall bear extra burden. Such party would not only need to bear his own sacrifice but also need to bear his share of ransom under marine salvage. Hence, when facing the marine peril of piracy, it is more sensible for ship owner to claim under general average rather than to claim under marine salvage.

In summary, the analysis of ship owner's claim under marine salvage has more theoretical merits than practical meanings. But it is undeniable that this mechanism could provide the ship owner and the cargo owner a broader horizon to observe the ransom paid to pirates. Although for ship owner the claim under marine salvage is not an ideal solution, for cargo owner such claim may greatly reduced his share of loss incurred by the ransom.

8.2 The Effects of Claiming The Loss of Ransom Under General Average

Compared with claiming loss of ransom under marine salvage, the claim under general average could be more practical and easier for the ship owner to exercise his rights. It provides more advantages to both the ship owner and the cargo owner. It also has a wider application. It can help to strike balance of interests among different parties. In return it would promote the development of marine transport industry.

8.2.1 Protecting The Interests of The Ship Owner

If the ransom is entirely borne by the ship owner, then it would greatly discourage the ship owner from rescuing the ship and the cargoes. In actual practice, the relevant parties would always resort external assistance from insurance companies. But as to the ransom paid by the ship owner, it would not be compensated except through the form of general average.

Whether the risk of piracy would be covered by war insurance has not been determined and thus it increases the uncertainty of claiming compensation under war insurance. Standard war insurance normally would not insure against the risks of piracy. But in modern times, piracy could be used for specific political purposes and thus may be regarded as a type of terrorism acts. If that is the case, possibly war insurance may insure against such kind of piracy. Here the deciding factor is the purpose of the attacks of pirates. As discussed above, Somali pirates are mainly driven by economic reasons rather than political purposes. After hijacking the ship, they would express to the ship owner that they are would not damage the ship or cargoes or harm the crew members as long as ransom would be paid. Therefore, the piracy conducted by Somali pirates is not for any political, religious or ideological

purposes. It is fundamentally different from terrorism act. Thus war insurance normally could not cover the payment of ransom to Somali pirates.

As to the hull insurance, for example Institute Time Clauses ('ITC') Hull terms, although piracy is covered by perils listed in the hull insurance⁵², the ship owner could not claim the loss of ransom through such total loss insurance because this total loss insurance only applies to physical damage to the ship. As mentioned above, Somali pirates normally would not damage or take the ship. Hence as long as ransom would be paid normally there would not be any physical damage to the ship. Thus the ship owner could not get compensation for the payment of ransom from insurers under hull insurance. Owing to the increasing number of pirate attacks, the international insurance market has adopted some new methods to deal with such risks. For example, the Lloyd's has developed a new type of piracy insurance. The ransom paid to pirates could be insured by special insurance or could be reimbursed as Sue and Labour Expense in each case⁵³. Although the international insurance market has proposed special insurance targeting at the seizure and the ransom, but the premium for such insurance policy is excessively high and thus the ship owners are discouraged from being insured. In order to protect the safety of voyage, some ship owners have no way but to arrange its own force to defeat the attacks from pirates. Thus, there are great difficulties for ship owners to acquire compensations through various hull insurance.

But when the ransom is regarded as general average, the loss of ransom would be shared by the cargo owners, which prevents the ship owner from bearing the entire loss. Moreover, the ship owner could acquire all risks insurance and then the payment of ransom would be ultimately borne by the insurance company. It is because the all risks insurance would cover the loss of general average due to the ransom. For example, ITC Hull terms article 10.1 provides that: *'This insurance covers the Vessel's proportion of salvage, salvage charge and/ or general average, reduced in respect of any under-insurance, but in case a general average sacrifice of the Vessel the Assured may recover in respect of the whole loss without first enforcing their right of contribution from other parties'*⁵⁴. Hence the costs of general average caused by risks insured would be paid by the insurer. When ransom is treated as general average, the ship owner would not only be able to share the ransom with the cargo owners but also be able to transfer the risks of ransom to insurance company through buying all risks hull insurance. All these would greatly help the ship owner to protect his interests.

Further, when claiming under general average, the ransom could enable the ship owner to acquire various general average guarantees. General average guarantee is a warranty made by all the beneficiaries to ensure the sharing of general average upon requisition. It is a measure taken after the declaration of general average in order to

⁵² F.D.Rose (1999) p.175

⁵³ Xiao Liu (2010) p.43

⁵⁴ Ibid. p.177

prevent the cargo owners from refusing to pay their shares of general average after the release of cargoes. Such guarantee could be general average deposit, guarantee letter from the insurer of the cargo owner, general average agreement or the exercise of the cargo lien. Thus when claiming under general average, the ship owner would have more methods to ensure that the cargo owners would fulfil the payment of his share of general average.

In addition, the ship owner may through general average acquire compensation for payment of ransom from P&I club which he may otherwise not obtain. The item 16 of Piracy FAQs of UK P&I Club states that '*ransom is not a risk which is expressly covered and one club has an express exclusion of liability for ransom payments.*'⁵⁵ Further, in *Royal Boskalis Westminster N.V. v Mountain*⁵⁶, it is held that if it is uncertain about the portion of ransom which would be used to release the crew members, then the P&I Club would not be responsible for the ransom. Thus payment of ransom has been excluded from the scope of insurance by P&I Club.

But if the payment of ransom is regarded as general average, the situation would be totally different. After satisfying the conditions for underwriting, the ship owner would be insured by the P&I Club for the part of general average which he is unable to obtain from a third party. Being different from the above situation, the ship owner is doubled secured here. Firstly, the payment of ransom is now insured by P&I Club in the form of general average. Secondly, the ship owner would obtain the payment of ransom anyway even there is a failure on the third party. Hence as long as the payment of ransom is claimed under general average, any failure of payment on the cargo owner would automatically be covered by the P&I Club. For example, where the ship owner breaches his marine transport contract and thus the cargo owner refuses to pay for the general average. In such situation, the cargo owners have justifiable grounds to refuse to share the payment of ransom. At this time the P&I Club would step in. If such part of general average has been paid by the ship owner and the ship owner could not acquire compensation from hull insurance, then the P&I Club would be responsible for this part. Thus, when claiming loss of ransom under general average, the ship owner may acquire compensation for payment of ransom from P&I Club which he may otherwise not obtain.

8.2.2 Protecting The Interests of The Cargo Owners

When ransom is regarded as general average, the ransom would be shared by all beneficiaries and it would encourage the ship owner to pay the necessary ransom which would in return protect the interests of the cargo owners. The payment of ransom enables the realization of the sales contract. Although the contract would be performed later than the time contracted, the preservation of cargoes shall protect the business interest of cargo owner to the maximum.

⁵⁵ UK P&I Club (2011) http://www.ukpandi.com/fileadmin/uploads/uk-pi/Latest_Publications/Circulars/Piracy%20FAQs.pdf

⁵⁶ *Royal Boskalis Westminster N.V. v Mountain* (1999) QB 674

When ransom is treated as general average, it seems to be detrimental to the cargo owners because it imposes obligation on the cargo owners to participate the sharing of the payment of ransom. But since the cargo owner is a major party within marine transport industry, it shall also bear risks together with the shipping party. Hence when the loss is incurred by reasons other than the shipping party's own fault, it should be shared between the ship owner and the cargo owners in a reasonable way. Otherwise, the balance of interest between the ship owner and cargo owner would be broken, the whole industry would be negatively impacted in the long term and the cargo owners would suffer in return. Thus, the cargo owner's participation in the sharing of ransom payment is the natural result of the gaming between the two parties. With payment of ransom, the cargo owner would be the ultimate beneficiary.

Further, the cargo owners' participation in the sharing of ransom payment does not necessarily mean that the cargo owners would be the final payer of the ransom. When the cargo owners are involved in the payment of ransom, it would enable the cargo owners to purchase relevant insurance and thus the loss would be finally borne by the insurance company. For example, Institute Cargo Clauses ('ICC') (A) conditions insure the loss of general average caused by piracy. Clause 1 (Risks Clause) in ICC (A) conditions provides that: *'This insurance covers all risks of loss of or damage to the subject matter insured except as provided in Clauses 4,5,6 and 7.'*⁵⁷ Here the expression 'all risks' comprehends any loss or damage occasioned fortuitously, but not that which occurs inevitably. Clause 6 (War Exclusion Clause) provides that: *'... 6.2 capture seizure arrest restraint or detainment (piracy excepted), and the consequences thereof or any attempt thereat....'*⁵⁸ Hence it is very clear that according to 6.2, piracy is excluded from the list of war exclusions and has been reinstated as a risk covered by marine underwriters when ICC (A) conditions apply.

Thus, there is no real detriment towards the cargo owners. All risks insurance would insure all the general average stemming from the piracy. Hence, after purchasing all risks insurance, the cargo owners' share of loss of ransom would be ultimately borne by the insurers. If the cargo owners only purchase total loss insurance, rather than all risks insurance, then the general average might not be compensated by the insurance policy. At this time, the cargo owner may purchase the additional general average risk insurance⁵⁹. If so, then the cargo owner would be protected against the general average stemming from the piracy as under all risks insurance.

8.2.3 Wider Application Under General Average

In special situations, claiming loss of ransom under general average may provide protection which is otherwise unavailable. A case in point is where the ship owner and the cargo owner are the same person. At this time, the marine salvage could not be claimed. It is because all the measures taken to salvage the ship would be regarded

⁵⁷ N.G. Hudson and J.C. Allen (1999) p.12

⁵⁸ Ibid. p.24

⁵⁹ Hai Lei (2009) P74

as self-help and thus the reward would be set off. But when considering under general average, compensation should not be impacted by the mere fact that the sharing parties are the same person. The same person would be treated as the ship owner and the cargo owner separately and each insurance policy would be applied respectively. Thus if the ship owner has purchased the ITC Hull terms, then the ship owner's loss of ransom would be covered by this policy accordingly. On the other hand, if the cargo owner has purchased all risks insurance, the cargo owner's loss of ransom would be borne by the relevant insurer as well. The insurers could not refuse to compensate solely because the ship owner and cargo owner are the same person. In the end, it is highly possible that all loss from the payment of ransom would be wholly paid by the relevant insurers. Hence although the ship owner and the cargo owner are in fact the same person, the person may still suffer no loss from payment of ransom. Such advantage of claiming under general average has also been stipulated in legislation. For example, in UK, section 66(7) of *Marine Insurance Act 1906* provides that: '*where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons.*'⁶⁰ Hence, when the ship owner and cargo owner are the same person, he can still claim under general average instead of marine salvage in order to acquire full compensation.

8.2.4 Striking Balance of Interests and Promoting The Developments of Industry

When the ship is seized by Somali pirates, it is an incident outside ordinary operation of the ship owner. The loss is not caused by the ship owner's fault. If the ship owner is asked to bear the entire loss, it is against the substantive fairness which is the fundamental value underpinning maritime law. In long term, it would be hard to keep balance of rights and obligations between different parties to the marine transport contract. In practice, since the obligation of the cargo sender terminates at the moment of delivery of cargoes, the ship owner would bear the obligation to transport the cargoes to the port of delivery. When the cargoes could not be transported in a secured process and such peril is not due to the fault of the ship owner, it would be unreasonable to let the ship owner to bear the entire loss so caused. Otherwise, it is in fact requiring the ship owner to provide an unconditional warranty of safe delivery of cargoes. Such obligation in fact would never be willingly promised by the ship owner and is also against substantive justice. Both the ship owner and the cargo owner are participants of marine transport industry. They shall not only share common benefits but also bear common risks. Hence only when the ransom could be reasonably shared by the ship owner and the cargo owner, could we strike a balance of rights and obligations between both parties. If the entire loss of ransom is wholly borne by the ship owner, ship owner would inevitably adopt a negative attitude in solving the seizure of Somali pirate. Otherwise they would change the route to Good Hope Cape. If this is the case, then the costs of marine transport would be greatly increased and it

⁶⁰ Marine Insurance Act 1906, section 66(7)

would subsequently harm the interests of cargo owner. Nowadays the conflicts of interests between the ship owner and the cargo owners are more obvious. With the advancement of marine transport industry, the power of the cargo owners is becoming bigger and they have stronger position in negotiating the marine transport contracts with the ship owners⁶¹. Hence the terms of contract may have imposed unfavourable obligations over the ship owners. When facing the common peril to both the ship and cargoes, if we further require the ship owner to bear all the loss so caused from such peril, the imbalance would be further aggravated. The ship owner would inevitably adopt a passive attitude and as a result the benefits of both the ship owner and the cargo owners would be negatively impacted. Hence, the sharing of risks is in fact a compromise reached between the ship owner and the cargo owner. It would alleviate the existing imbalance between the two parties. As balance of interests between the two parties is an objective requirement of maintenance and advancement of marine transport industry, thus sharing of risks would ultimately promote the development of the industry.

⁶¹ Dan Shi (2009) p.78

9. Conclusion

9.1 The Summary of Findings

The identification of the nature of the ransom paid to the Somali pirates is a new issue in maritime law. Although Roman law identified such ransom as general average, the new features of the ransom paid to Somali pirates, together with the lack of clear identification under modern law, bring up difficulties for such matter.

Within actual practice, the claim for the payment of ransom to Somali pirates could be realized either as marine salvage or as general average. As long as the ship and cargoes are facing common perils and if the measure taken by one party can preserve the properties of both parties, claim under marine salvage and general average both could be established. But these two methods are mutually exclusive and the ship owner must make a wise choice. As mentioned above, the payment of ransom as marine salvage could only be established against the cargo owner. For the ship owner, it is only self-help. Hence, the ship owner could not claim compensation for his share of ransom under marine salvage. It would incur loss for the ship owner. Therefore, claiming loss of ransom under marine salvage is rarely applied in actual practice.

By comparison, the claim under general average may be more beneficial to both the ship owner and the cargo owners. For the ship owner, when the ransom is regarded as general average, the loss from ransom would be shared by the cargo owners, which prevents the ship owner from bearing the entire loss. Moreover, the ship owner could acquire hull insurance and then the payment of ransom would be ultimately borne by the insurance company. Thus the ship owner is able to transfer the risks of ransom which help the ship owner to protect his interests. Further, when claiming under general average, the ransom could enable the ship owner to acquire various general average guarantees. It is a measure taken after the declaration of general average in order to prevent the cargo owners from refusing to pay their shares of the general average after the release of cargoes. Thus when claiming under general average, the ship owners would have more methods to ensure that the cargo owner would pay their shares of general average. In addition, the ship owner may through general average acquire compensation for the payment of ransom from P&I club. The ship owner would be insured by the P&I Club for the part of general average which he is unable to obtain from a third party. Thus the ship owner is doubled secured here. Hence as long as the payment of ransom is claimed under general average, any failure of payment on the cargo owners would automatically be covered by the P&I Club.

For the cargo owners, when ransom is regarded as general average, the ransom would be shared by all beneficiaries. It would encourage the ship owner to pay the necessary ransom, which would in return protect the interests of cargo owners. The payment of ransom enables the realization of the sales contract. Although the contract would be performed later than the time contracted, the preservation of cargoes shall protect the business interest of cargo owner to the maximum. The cargo owners' participation in

the sharing of loss of ransom does not necessarily mean that the cargo owners would be the final payer of the ransom. When the cargo owners are involved in ransom payment, it would enable the cargo owner to purchase all risks insurance and thus the loss would be finally borne by the insurance company. Thus, there is no real detriment towards the cargo owners.

Hence, it is clear that when the ship owner claims compensation for loss of ransom as general average, the loss would be shared between him and the cargo owners. Then his share of loss would be transferred to the insurance company, as long as he is insured under all risks insurance or total loss insurance with general average. The cargo owner's share of loss would also be transferred to the insurer as long as he is insured under relevant cargo insurance policy. Hence, the loss of ransom paid to Somali pirates is spread over the whole society and the ship owner would avoid bearing the whole loss by him only.

9.2 Future Developments

Claiming loss of ransom under general average may strike a balance between the ship owner and the cargo owners. But this mechanism is indirect and must operate in the name of the general average. In order to achieve such balance, it needs the co-operations among the ship owner, the cargo owners and the relevant insurers. If the cargo owners introduce reasonable excuses and refuse to share the loss of ransom or if the insurers find out some defects and refuse to compensate the loss, then the ship owner would be at a very disadvantage position.

A possible solution for such problem may come from P&I Club. P&I Club is set up by ship owners as a mutual insurance organization with no aim of making profits. The risks it insures are those which the ship owner may meet in actual operation but there is no insurer who is willing to insure. Hence P&I Club would always play a very important role to supplement the functions of insurers. This would provide an overall protection for the ship owner. Thus P&I Club has great potential for further developments and the risks of ransom paid to pirates may be one of the space for development. The nature of loss of ransom is similar to the nature of risks which are insured by P&I Club. However, at present P&I Club does not provide any insurance for such risks. Thus it is highly helpful if P&I Club could enlarge its scope of insurance and enable the risk of ransom to be contained within. Three major reasons could be raised. Firstly, the ransom paid to pirates would always be paid by the ship owner firstly and later the ship owner would request the cargo owners to share such loss. Such process is disadvantageous to the ship owner as he needs to bear the uncertainties happened during this process. If P&I Club can cover the loss of ransom, then the ship owner would be released from the aforementioned disadvantage. In return it would be beneficial for the development of the whole industry. Secondly, piracy insurance as a kind of commercial insurance has its own defects. Ordinary insurer would be reluctant to provide insurance for such risk as the possibility of such risk is very high but the profits from the insurance policy are relatively low. Thus P&I

Club should step in. If P&I Club may insure against such risk then the ship owner's interests would be greatly enhanced. Thirdly, at present a special 'hijacking and ransom' insurance has been developed by the market. Thus P&I Club should play a more active role in response to the advancement of the insurance market. Only through this way can the P&I Club keep abreast with the development of the insurance market as well as the progress of the marine transport industry.

P&I Club may list the risk of ransom as an individual item in its coverage. When the ship is seized by pirates, the ship owner would pay the ransom and meanwhile he could raise requisition of compensation from P&I Club. P&I Club would refer to the marine transport contract and look at the whole surroundings. Then it decides whether it shall compensate and how much it would compensate. In order to keep a balance, P&I Club may raise the membership fees so that it is capable to pay for such requisition. With the intervention of P&I Club, the ship owner's burden of paying the ransom would be greatly reduced and the risk would be further spread. A more audacious idea is to let P&I Club engage in the payment of ransom directly. Thus when ransom is demanded by pirates, it is the P&I Club, rather than the individual ship owner, which directly involves in the negotiation and payment of ransom. If this is the case, then the accountability of the payment would be increased, especially when the cargo owners could not involve in the negotiation with pirates, and the ship owner would enjoy higher degree of protection with regard to the loss of ransom.

Hence, when the ship owner suffers loss of ransom, the best solution for the ship owner is to claim general average. Such loss would be share between all the parties to the marine transport contract, which shall ultimately be borne by relevant insurers. But with the advancement of the market, such claim under general average may not provide full protection for the ship owner. Hence P&I Club should take more active actions and introduce new types of insurance in order to cover the loss of ransom. Alternatively, P&I Club may also directly involve in the settlement of ransom.

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List of Abbreviations

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| ICC | Institute Cargo Clauses |
| ICS | International Convention on Salvage |
| ITC | Institute Time Clauses |
| UNCLS | United Nations Convention on Law of the Sea |
| YAR | York-Antwerp Rules |